

(24) **VOLUNTARILY NEGOTIATED ACCESS AGREEMENT.**—The term “voluntarily negotiated access agreement” means an access agreement voluntarily negotiated between 1 or more providers of a covered electronic payment system and 1 or more merchants that sets the fees and terms under which the merchant can access that covered electronic payment system.

(25) **WRITTEN DIRECT STATEMENTS.**—The term “written direct statements” means witness statements, testimony, and exhibits to be presented in proceedings under this Act, and such other information that is necessary to establish fees and terms for access to covered electronic payment systems as set forth in regulations issued by the Electronic Payment System Judges under section 5(b)(4).

**SEC. 3. ACCESS TO COVERED ELECTRONIC PAYMENT SYSTEMS; LIMITED ANTITRUST IMMUNITY FOR THE NEGOTIATION AND DETERMINATION OF FEES AND TERMS; STANDARDS FOR ESTABLISHMENT OF FEES AND TERMS.**

(a) **ACCESS TO COVERED ELECTRONIC PAYMENT SYSTEMS.**—Access by a merchant to any covered electronic payment system and the fees and terms of such access shall be subject to this Act.

(b) **AUTHORITY AND LIMITED ANTITRUST IMMUNITY FOR NEGOTIATIONS OF FEES AND TERMS AND PARTICIPATION IN PROCEEDINGS.**—

(1) **IN GENERAL.**—Notwithstanding any provision of the antitrust laws—

(A) in negotiating fees and terms and participating in any proceedings under subsection (c), any providers of a covered electronic payment system and any merchants who have access to or who are seeking access to that covered electronic payment system may jointly negotiate and agree upon the fees and terms for access to the covered electronic payment system, including through the use of common agents that represent the providers of the covered electronic payment system or the merchants on a nonexclusive basis; and

(B) any providers of a single covered electronic payment system also may jointly determine the proportionate division among such providers of paid fees.

(2) **LIMITATIONS.**—The immunity from the antitrust laws conferred under this subsection shall not apply to a provider of a covered electronic payment system or to a merchant during any period in which such provider, or such merchant, is engaged in—

(A) any unlawful boycott;

(B) any allocation with a competitor of a geographical area;

(C) any unlawful tying arrangement; or

(D) any exchange of information with, or agreement with, a competitor that is not reasonably required to carry out the negotiations and proceedings described in subsection (c).

(c) **ESTABLISHMENT OF FEES AND TERMS.**—

(1) **VOLUNTARILY NEGOTIATED ACCESS AGREEMENTS.**—

(A) **AGREEMENTS BETWEEN NEGOTIATING PARTIES.**—A voluntarily negotiated access agreement may be executed at any time between 1 or more providers of a covered electronic payment system and 1 or more merchants. With respect to the negotiating parties, such executed voluntarily negotiated access agreement shall supersede any fees or terms established by the Electronic Payment System Judges under paragraph (3) relating to that covered electronic payment system.

(B) **FILING AGREEMENTS WITH THE ELECTRONIC PAYMENT SYSTEM JUDGES.**—The negotiating parties shall jointly file with the Electronic Payment System Judges—

(i) any voluntarily negotiated access agreement that affects any market in the United States or elsewhere;

(ii) any documentation relating to a voluntarily negotiated access agreement evidencing any consideration being given or any marketing or promotional agreement between the negotiating parties; and

(iii) any amendment to that voluntarily negotiated access agreement or documentation.

(C) **TIMING AND AVAILABILITY OF FILINGS.**—The negotiating parties to any voluntarily negotiated access agreement executed after the date of enactment of this Act shall jointly file the voluntarily negotiated access agreement, and any documentation or amendment described in subparagraph (B), with the Electronic Payment System Judges not later than 30 days after the date of execution of the voluntarily negotiated access agreement or amendment or the date of the creation of the documentation, as the case may be. The Electronic Payment System Judges shall make publicly available any voluntarily negotiated access agreement, amendment, or accompanying documentation filed under this paragraph.

(2) **INITIATION OF PROCEEDINGS.**—The proceedings under this subsection to establish fees and terms for access to a covered electronic payment system shall be initiated in accordance with section 6.

(3) **PROCEEDINGS.**—

(A) **IN GENERAL.**—The Electronic Payment System Judges shall conduct proceedings as specified under this Act to establish fees and terms for access to a covered electronic payment system. Except as specifically provided in a voluntarily negotiated access agreement, a provider of a covered electronic payment system may not directly or indirectly charge fees or set terms for access to a covered electronic payment system that are not in accordance with the fees and terms established by the Electronic Payment System Judges pursuant to proceedings under this Act.

(B) **PERIOD OF APPLICABILITY.**—Except as provided in section 6, the fees and terms established under this paragraph with respect to a covered electronic payment system shall apply during the 3-year period beginning on January 1 of the second year following the year in which the proceedings to establish such fees and terms are commenced.

(C) **STANDARD FOR ESTABLISHMENT OF FEES AND TERMS BY THE ELECTRONIC PAYMENT SYSTEM JUDGES.**—

(i) **IN GENERAL.**—In establishing fees and terms for access to a covered electronic payment system under subparagraph (A), the Electronic Payment System Judges—

(I) shall be limited to selecting, without modification, 1 of the 2 final offers of fees and terms filed by the proceeding parties pursuant to section 5(c)(2)(A); and

(II) shall select the final offer of fees and terms that most closely represent the fees and terms that would be negotiated in a hypothetical perfectly competitive marketplace for access to an electronic payment system between a willing buyer with no market power and a willing seller with no market power.

(ii) **STANDARDS.**—In determining which final offer of fees and terms to select, the Electronic Payment System Judges—

(I) shall consider the costs of transaction authorization, clearance, and settlement that are necessary to operate and to access an electronic payment system;

(II) shall consider a normal rate of return in a hypothetical perfectly competitive marketplace;

(III) shall avoid selecting a final offer of fees and terms that would have anticompetitive effects within the issuer market, the acquirer market, or the merchant market;

(IV) may select a final offer that is a schedule of fees and terms that varies based upon cost-based differences in types of credit card and debit card transactions (which may include whether a transaction is of a signature-based, PIN-based, or card-not-present type);

(V) may select a final offer that is a schedule of fees and terms that provides alternative fees and terms for those acquirers or issuers that are regulated by the National Credit Union Administration or that, together with affiliates of the acquirer or issuer, have assets in a total amount of less than \$1,000,000,000; and

(VI) may not select a final offer that is a schedule of fees and terms that varies based on type of merchant or volume of transactions (either in number or dollar value).

(D) **USE OF EXISTING FEES AND TERMS AS EVIDENCE.**—In establishing fees and terms for access to a covered electronic payment system under this paragraph, the Electronic Payment System Judges—

(i) shall decide the weight to be given to any evidence submitted by a proceeding party regarding the fees and terms for access to comparable electronic payment systems, including fees and terms in voluntarily negotiated access agreements filed under paragraph (1); and

(ii) shall give significant weight to fees in a voluntarily negotiated access agreement that are substantially below the fees reflective of the market power of the covered electronic payment systems that existed before the date of enactment of this Act.

**SEC. 4. ELECTRONIC PAYMENT SYSTEM JUDGES.**

(a) **APPOINTMENT.**—The Attorney General and the Chairman shall jointly appoint 3 full-time Electronic Payment System Judges, and shall appoint 1 of the 3 Electronic Payment System Judges as the Chief Electronic Payment System Judge.

(b) **DUTIES.**—The Electronic Payment System Judges shall establish fees and terms for access to covered electronic payment systems in accordance with this Act.

(c) **RULINGS.**—The Electronic Payment System Judges may make any necessary procedural or evidentiary ruling in a proceeding under this Act and may, before commencing a proceeding under this Act, make any procedural ruling that will apply to a proceeding under this Act.

(d) **ADMINISTRATIVE SUPPORT.**—The Attorney General and Chairman shall provide the Electronic Payment System Judges with the necessary administrative services related to proceedings under this Act.

(e) **LOCATION.**—The offices of the Electronic Payment System Judges and staff shall be located in the offices of the Department of Justice or the Federal Trade Commission.

(f) **QUALIFICATIONS OF ELECTRONIC PAYMENT SYSTEM JUDGES.**—Each Electronic Payment System Judge shall be an attorney who has at least 7 years of legal experience. The Chief Electronic Payment System Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. At least 1 Electronic Payment System Judge who is not the Chief Electronic Payment System Judge shall have significant knowledge of electronic payment systems. At least one Electronic Payment System Judge shall have significant knowledge of economics. An individual may serve as an Electronic Payment System Judge only if the individual is free of any financial conflict of interest under the standards established under subsection (m).

(g) **STAFF.**—The Chief Electronic Payment System Judge shall hire, at minimum, 3 full-time staff members to assist the Electronic Payment System Judges in performing the duties of the Electronic Payment System Judges under this Act.